

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

In the Matter of

Petition of Blue Casa Communications, Inc.  
for Declaratory Ruling Concerning  
Intercarrier Compensation for ISP-Bound  
VNXX Traffic

WC Docket No.09-8

**REPLY COMMENTS OF PAC-WEST TELECOMM, INC.**

Pac-West Telecomm, Inc. ("Pac-West") hereby submits its Reply Comments to the Petition of Blue Casa for Declaratory Ruling<sup>1</sup> filed in the above-captioned matter on December 19, 2008. Pac-West respectfully maintains that the Blue Casa Petition should be denied in its entirety. In its Petition, Blue Casa erroneously argues that calls bound for Internet service providers ("ISPs"), that are delivered via virtual NXX ("VNXX") arrangements should be subject to interstate switched access charges pursuant to the "carve out" provisions of 47 U.S.C. § 251(g) ("Section 251(g)" or "251(g)" of the Telecom Act of 1996, the "1996 Act"), rather than reciprocal compensation under 47 U.S.C. § 251(b)(2) ("Section 251(b)(2)" or "251(b)(2)").

In addition to Pac-West, more than thirteen other commenters responded to the Commission's request for comments on the Blue Casa Petition – the majority opposed the Petition. Pac-West reiterates its opposition to the Petition and respectfully submits both for the

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<sup>1</sup> *In re Declaratory Ruling That, Pursuant to the Carve-Out Provisions at 47 U.S.C. §251(g), Interstate Originating Switched Access Charges, Not Reciprocal Compensation Charges, Apply to ISP-Bound Calls That are Terminated via VNXX-type Foreign Exchange Arrangements*, WC Docket No. 09-8, DA 09-467 ("Blue Casa Petition").

reasons set forth in Pac-West's initial Comments in this docket and for the reasons set forth below, that the Blue Casa Petition should be denied in its entirety.

## **I. INTRODUCTION AND SUMMARY.**

On its face, the Blue Casa Petition does not present a controversy to be resolved, lacking an adequate description of even a hypothetical dispute. In reality, Blue Casa is attempting to obtain a declaratory ruling in this isolated case as a means to establish a broad and far reaching rulemaking on intercarrier compensation. Given the current status of intercarrier compensation regulation and the Federal Communications Commission's (the "Commission" or the "FCC") long standing proceeding to implement comprehensive intercarrier compensation reform,<sup>2</sup> Blue Casa Petition's request for a declaratory ruling is not the appropriate means to effect intercarrier compensation policy changes, regardless of whether its substantive arguments are correct.

Blue Casa's claim, that ISP-Bound VNXX traffic exchanged between two competitive local exchange carriers ("CLECs") comes within the scope of the 251(g) carve out, fails for two reasons. First, ISP-bound VNXX traffic is not within the scope of the "carve-out" provisions of Section 251(g) of the Act. The VNXX traffic model did not exist prior to the 1996 Act. Although Blue Casa strains to morph VNXX traffic into traditional Foreign Exchange traffic, these services are and always have been two distinct services; their physical structure is completely different. Secondly, 251(g) applies only to services provided by LECs to interexchange carriers ("IXCs") and Internet service providers ("ISPs"). Court precedent establishes quite clearly that Section 251(g) does not apply to the exchange of traffic between two CLECs even when the CLEC is providing services to an ISP.

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<sup>2</sup> See generally, *In re Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92.

Pac-West urges the Commission to rule that Virtual VNXX (“VNXX”) arrangements should continue to be regulated by state commissions, as they are today. If, however, the Commission determines to take action relating to VNXX, Pac-West urges that the Commission do so in a comprehensive reform of intercarrier compensation, rather than in response to the ad hoc declaratory matter presented by the Blue Casa Petition. Creating changes to a relatively small component of the broad field of intercarrier compensation in piecemeal fashion through a declaratory ruling will actually create more controversies than it will resolve.

**II. THE FCC SHOULD NOT GRANT THE RELIEF SOUGHT BY BLUE CASA.**

**A) BLUE CASA FAILS TO ESTABLISH THAT THERE IS A CONTROVERSY THAT REQUIRES A DECLARATORY RULING TO SETTLE.**

As an initial matter, the declaratory ruling process is not appropriate for resolution of the issues raised by the Blue Casa Petition. The Blue Casa Petition states that its claim for relief is necessary “to resolve actual, on-going controversies with other competitive telecommunications carriers.”<sup>3</sup> However, as Verizon correctly points out in its Comments, Blue Casa has failed to identify even one ongoing controversy between it and another competitive carrier.<sup>4</sup> Although Pac-West and Blue Casa formerly had a dispute over compensation for VNXX traffic in California, that dispute has been settled.<sup>5</sup> Pac-West is unaware of any other ongoing proceeding relating to VNXX that involves Blue Casa and another competitive provider. Blue Casa has thus failed to show that there is any actual “controversy” that a declaratory ruling would resolve. The

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<sup>3</sup> Blue Casa Petition at 1.

<sup>4</sup> Verizon Comments at 3.

<sup>5</sup> Decision 08-12-024, Pac-West Telecomm, Inc. v. Blue Casa Communications, Inc. (Cal. Pub. Utils. Comm’n Dec. 15, 2008).

Commission does not issue declaratory rulings in the absence of an identified actual controversy.<sup>6</sup>

Because there is neither an actual controversy, nor any specific fact pattern established on which a declaratory ruling could focus, those few comments that support the Blue Casa Petition rarely stay on point. In a proceeding that should be focused on a specific controversy, some commenters are treating it as a free for all proceeding on all matters relating to access charges. For example, Embarq has taken the opportunity to ask that the FCC address intrastate access charges, even while admitting that such charges have nothing to do with Blue Casa or its Petition:

At the same time, the Commission should also confirm that -- when the ISP server is located in the same state as the local exchange carrier's end user originating the call -- then intrastate access charges apply. Blue Casa did not speak to this issue directly, but the conclusion is compelled by the Commission's treatment of such arrangements.<sup>7</sup>

Qwest's comments seek to substantially expand the proceeding through a comprehensive "elaboration" that extends far beyond the Blue Casa Petition.<sup>8</sup> The Joint Comments filed by NECA, NTCA, ITTA, OPASTCO, US Telecom and WTA, focus almost entirely on relationships between incumbent local exchange carriers ("ILECs") and wireless carriers/CLECs. These comments make clear that rather than presenting a discrete issue which can legitimately be addressed through this proceeding, Blue Casa's Petition presents but a narrow subsection of the much larger and more complex intercarrier compensation issue; the intercarrier compensation issue can only be adequately addressed by the Commission in comprehensive fashion.

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<sup>6</sup> See, e.g., 47 C.F.R. § 1.2.

<sup>7</sup> Embarq Comments at 6.

<sup>8</sup> Qwest Comments at 10-11.

The lack of specificity in the Blue Casa Petition has been noted in several of the Comments opposing the Petition. In their Comments, @ Communications, Inc. points out that Blue Casa does not even describe the physical interconnection arrangement and routing that it uses.<sup>9</sup> Moreover, both Verizon and @ Communications, Inc. point out that it is unclear whether any declaratory ruling would effect or address preexisting interconnection agreements and negotiated contracts.<sup>10</sup> Level 3 notes that Blue Casa has even failed to define what it means by “virtual NXX (‘VNXX’) -type foreign exchange arrangements,” in its Petition.<sup>11</sup> In light of Blue Casa’s failure to show a compelling reason for the issuance of a declaratory ruling, or to establish an actual controversy requiring such a ruling, the Commission should deny the Blue Casa Petition.

**B. VNXX IS A SERVICE ARRANGEMENT THAT DID NOT EXIST PRIOR TO 1996 AND THEREBY CLEARLY NOT COVERED BY SECTION 251(g).**

Assuming for the sake of argument that the Commission were to reach the question of how intercarrier compensation for ISP-bound VNXX should be treated, the answer is clear. Neither VNXX in general, nor ISP-bound VNXX in particular, qualifies for the carve out from reciprocal compensation set forth in Section 251(g). Section 251(g) reads, in relevant part, as follows:

[E]ach local exchange carrier...shall provide exchange access, information access, and exchange services for such access to *interexchange carriers and information service providers* in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) *that apply to such carrier on the date immediately preceding the date of enactment...* under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission.<sup>12</sup>

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<sup>9</sup> @ Communications Comments at 11.

<sup>10</sup> Verizon Comments at 6; @ Communications Comments at ii.

<sup>11</sup> Level 3 Comments at 2.

<sup>12</sup> 47 U.S.C. §251 (emphasis added).

Thus in enacting Section 251(g), Congress meant to preserve, for a transitional period, those compensation patterns that *already were in existence* at the time that the 1996 Act was passed. Accordingly, under the plain meaning of Section 251(g), traffic configurations that were not the subject of specific Commission access charge regime or other identified exceptions from reciprocal compensation pursuant to Section 251(B)(5) prior to the passage of the 1996 Act cannot be subject to Section 251(g).

It is undisputed that all telecommunications traffic other than traffic specifically exempted under Section 251(g) falls under Section 251(b)(5).<sup>13</sup> Therefore, because VNXX is a service that was not the subject of any Commission decision, regulation, or policy prior to the enactment of the 1996 Act, VNXX traffic cannot qualify for treatment under Section 251(g). Such traffic must necessarily therefore be covered by Section 251(b)(5) of the 1996 Act. As a result, no further analysis is needed to determine how VNXX traffic should be treated.

Apparently recognizing that modern VNXX arrangements did not exist prior to the 1996 Act, Blue Casa strains to rescue its position by arguing in essence that VNXX is similar to Foreign Exchange service ("FX service"), a type of service which did exist prior to the Act. VNXX is so similar to FX service, Blue Casa argues, that the two services should be treated the same way.

Contrary to Blue Casa's assertions however, FX service differs from VNXX service in important respects. Historically, FX Service was a service that was created in a time where Regional Bells were not permitted to provide long distance services and competitive providers

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<sup>13</sup> "The scope of section 251(b)(5) is limited only by section 251(g), which temporarily grandfathered the pre-1996 Act rules governing 'exchange access, information access, and exchange services for such access' provided to interexchange carriers and information service providers until 'explicitly superseded by regulations prescribed by the Commission.'" *ISP Mandamus Order*, ¶ 9 (footnote omitted).

where non-existent. Furthermore, VNXX and FX are distinct services that are routed differently, are physically unlike and are provided pursuant to fundamentally different regulatory structures. Interstate FX is provided pursuant to federal tariffs, but VNXX is provided pursuant to local exchange tariffs approved by state commissions. The physical differences between VNXX and FX are covered in detail by other commentors. For example, as pointed out in the Comments submitted by ALEC, Inc.,

In a traditional FX service, the customer is physically connected to, and in effect 'draws dial tone' out of, the distant switch that houses the NXX code of the customer's assigned FX number. But in a VNXX arrangement, the customer . . . physically connects directly to the nearest switch of the LEC (normally a CLEC) that provides the customer's dial tone.<sup>14</sup>

Indeed, the only physical similarity between VNXX and FX services appears to be the fact that customers are able to call both an FX service customer and a VNXX customer as a "local" call as long as the number assigned to the called party is in the same local calling area.

Moreover, any functional similarity between FX service and VNXX is beside the point for purposes of intercarrier compensation. By analogy, Voice over Internet Protocol ("VoIP") service has functionality similar in many ways to plain old telephone service ("POTS"). Yet regulation of VoIP and POTS differ in significant ways because the two are, in fact, different services and the rationale underlying the regulatory regime that applies to POTS may not apply to VoIP services. Similarly, Section 251(g) was enacted to preserve explicit compensation mechanisms for pre-1996 Act services such as FX service, a fact which is wholly irrelevant to post-1996 services such as VNXX. The fact that a new service may, to some extent, resemble the function of an older service simply does not qualify it for inclusion in that earlier regulatory regime.

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<sup>14</sup> ALEC Comments at 9.

**C. BLUE CASA VNXX TRAFFIC IS CLEC TO CLEC – BECAUSE NO IXC CARRIERS ARE INVOLVED, THE INTERCARRIER COMPENSATION MUST BE COVERED BY SECTION 251(B)(5).**

A second fatal flaw in Blue Casa's attempt to shoehorn VNXX arrangements between CLECs like Pac-West and Blue Casa into Section 251(g) exists: the applicability of Section 251(g) is limited to services provided to IXCs and ISP. Facially, Section 251(g) does not cover CLECs (even if the CLEC is ultimately serving an ISP). The *WorldCom*<sup>15</sup> court found that, by its plain terms, Section 251(g) applies only to "services provided 'to interexchange carriers and information services providers'; LECs' services to other LECs, even if en route to an ISP, are not 'to' either an IXC or to an ISP."<sup>16</sup> Blue Casa attempts to make an end-run around this by saying that the CLEC is the functional equivalent of an IXC despite the fact that the telephone number provided by the terminating local exchange carrier to the ISP is associated with a rate center in the same local calling area as the telephone number assigned by Blue Casa to its customer.

**D. THE DETERMINATION OF WHETHER VNXX CALLS ARE RATED AS LOCAL OR LONG DISTANCE IS A STATE ISSUE.**

Grant of the Blue Casa Petition would unnecessarily disturb long standing state law and impinge on the ability of the States to set their local calling areas. Historically, state commissions have been exercised wide latitude in defining the local calling areas that will apply in their respective States. Close state involvement with such issues make perfect sense, as the state commission have the closest familiarity with their respective market places. Given that issues such as the rating of VNXX are intertwined with determinations over the size and scope of

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<sup>15</sup> *WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002) ("*WorldCom*").

<sup>16</sup> *Id.*, 288 F.3d at 433-34.

local calling areas, the determination of whether VNXX traffic should be rated as local or toll has typically been made on a state by state basis.

Over time, a significant body of law has developed. In some instances, such laws pre-date the 1996 Act. State regulation, including the examples cited in Pac-West's Comments,<sup>17</sup> is part of state commission authority to define local calling areas.<sup>18</sup> State actions in this area have formed a body of laws upon which carriers operating in the various states have come to rely. From that perspective, the Blue Casa Petition if granted could potentially change the way VNXX is compensated in a number of states – a result which would unnecessarily disturb the carefully negotiated commercial relationships between carriers and unnecessarily change the regulatory landscape within which carriers operate.

**E) THE COMMISSION SHOULD NOT ADDRESS INTERCARRIER COMPENSATION ISSUES ON A PIECEMEAL BASIS.**

Intercarrier compensation questions are by their nature complicated and complex, in part because they involve a wide variety traffic patterns and differently situated carriers. The specific question raised by the Blue Casa Petition involves only one substantive subset of the intercarrier compensation regime that controls how carriers compensate each other for the use of their networks. In light of its complexity, the subject of intercarrier compensation has been the focus of an extensive and on-going proceeding which remains active before the Commission.<sup>19</sup> In that proceeding, the Commission has wisely attempted to incorporate all of the different elements of intercarrier compensation in order to achieve a holistic approach to reforming intercarrier

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<sup>17</sup> Pac-West Comments at 6-7.

<sup>18</sup> While treatment of compensation for VNXX calls varies, in most cases, state commissions rate calls based upon NPA-NXX codes, not the physical location of the customers. *See, e.g.,* D.08-12-002, *Pac-West v. Comcast Phone of CA*, (Cal. Pub. Utils. Comm'n Dec. 5, 2008). This determination is made by State Commissions and may vary from state to state. If the calling and called parties share an NPA- NXX code, the calls are normally rated as local calls.

<sup>19</sup> *See generally, In re Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92.

compensation. Were the Commission to do anything other than deny the Blue Casa Petition in its entirety, the result would be the establishment of piecemeal changes to intercarrier compensation; such a change has the potential to create unintended consequences and additional controversies. Rather than addressing this issue within the narrow confines of the Blue Casa Petition, and as the Commission has recognized on numerous occasions, the Commission must address intercarrier compensation in a comprehensive proceeding that addresses all the effects and consequences of changes to the current regime.

In light of the foregoing, Pac-West reiterates its view that the Blue Casa Petition should be denied. If the Commission determines that it should reexamine the treatment of VNXX traffic, the appropriate forum would be the Commission's comprehensive proceeding addressing inter-carrier compensation reform. The piecemeal approach to modifying the current situation of where access charges apply would create a disjointed and potentially inconsistent regulatory regime. Indeed, the issuance of a declaratory ruling would have the effect of creating more controversies and leaving many questions unresolved. In order to avoid the creation of increased levels of uncertainty, were the FCC to provide Blue Casa with declaratory relief, it would need to address a myriad of issues not raised by Blue Casa despite the clear relevance of these issues to the relief Blue Casa simplistically seeks.

### III. CONCLUSION

For the reasons set forth above, the issues raised by the Blue Casa Petition are not appropriate for resolution in this proceeding. Moreover, even if they were, the Blue Casa Petition should be denied because it is well settled that VNXX traffic is subject to the provisions of Section 251(b)(5). Consequently, the Blue Casa Petition should be denied in its entirety.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Brian McDermott", with a horizontal line extending to the right.

Brian McDermott  
Edward S. Quill, Jr.

Attorney for Pac-West Telecomm, Inc.

Dated March 23, 2009